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In the Supreme Court of the United States

MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED, *et al.*,
Petitioners,

v.

GREG MANNING, *et al.*,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF NATURAL GAS SUPPLY ASSOCIATION, WESTERN POWER TRADING FORUM AND ELECTRIC POWER SUPPLY ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The Natural Gas and Electric Power Industry *Amici* listed below respectfully submit this brief in support of Petitioners:

The Natural Gas Supply Association ("NGSA") is a trade association that represents integrated and independent companies that produce and market natural gas. Established in 1965, NGSA encourages the use of natural gas within a balanced national energy policy, and promotes the benefits of competitive markets to ensure reliable and efficient transportation and delivery of natural gas and to increase the supply of natural gas to U.S. customers. Members of the NGSA account for approximately thirty percent of the domestic natural gas production and are shippers on interstate pipelines.[2]

Western Power Trading Forum ("WPTF") is a California non-profit, public benefit corporation. Its broad-based membership includes energy service providers, scheduling coordinators, generators, power marketers, financial institutions, energy consultants and public utilities dedicated to enhancing competition in Western electric markets

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[1] No counsel for a party has authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. A blanket consent letter on behalf of all parties is on file with this Court.

[2] This brief represents the position of NGSA, WPTF and EPSA as organizations, but not necessarily the views of any particular member of such organizations with respect to any issue.

while maintaining the region's current high level of system reliability.

The Electric Power Supply Association ("EPSA") is a national trade association that represents the competitive power industry. EPSA's members include 14 companies, along with numerous supporting members, and state and regional partners representing the competitive power industry in their respective regions. EPSA's members have significant financial investments in electric generation and electricity marketing operations across the country.

INTRODUCTION AND SUMMARY OF ARGUMENT

A. The Court's construction of the exclusive jurisdiction provision of the Securities Exchange Act of 1934 ("Exchange Act") in this case will impact the interpretation of the substantially identical exclusive jurisdiction provisions contained in the Federal Power Act and the Natural Gas Act. Like § 27 of the Exchange Act, § 317 of the Federal Power Act, 16 U.S.C. § 825p, and § 24 of the Natural Gas Act (formerly § 22), 15 U.S.C. § 717u, mandate that federal courts "shall have exclusive jurisdiction of violations of" each Act and regulations promulgated thereunder, and "of all suits in equity and actions at law brought to enforce any liability or duty created by" those statutes and the associated regulations. *Amici* represent a broad cross-section of the natural gas and electric power industries that will be directly and significantly impacted by this Court's decision.

B. The Federal Power Act creates a uniform, nationwide framework that empowers the Federal Energy Regulatory Commission ("FERC") to regulate the interstate transmission and wholesale sale of electric energy. The Natural Gas Act similarly creates a uniform, nationwide framework that empowers FERC to regulate the interstate transportation and certain wholesale sales of natural gas.[3] In support of those objectives, both statutes provide for exclusive jurisdiction in the federal courts over [1] causes of action expressly arising under the Natural Gas Act and Federal Power Act, and [2] causes of action that seek to enforce statutory or regulatory "duties" or "liabilities" under those Acts. The first category of cases includes express causes of action under the Natural Gas Act and Federal Power Act, which fall under the "arising under" jurisdiction of the federal courts. The second category of cases captures causes of action that rely on a "duty" or "liability" created by the Natural Gas Act, Federal Power Act or FERC regulation, but are not federal causes of action expressly authorized by those statutes. (In fact, there are no implied rights of action under either the Federal Power or Natural Gas Acts.) These exclusive jurisdictional grants further the interest of uniformity by ensuring that federal judges—and only federal judges—guided and bound by more than seven decades of federal precedent, construe these intricate and complex

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[3] FERC's regulatory authority does not apply to all sales of natural gas at wholesale. Section 601(a)(1) of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3431(a)(1), removed "first sales" of natural gas from FERC regulation under the Natural Gas Act.

federal regulatory frameworks consistently and authoritatively.

As under the Exchange Act, private plaintiffs—and occasionally state attorneys general—have attempted to create state-law causes of action based on statutory and regulatory duties and liabilities under the Natural Gas Act and Federal Power Act. For example, California's Attorney General attempted to bring a state-law cause of action against various power companies in state court based on alleged violations of federal tariffs approved by FERC. *See California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831 (9th Cir. 2004). The Ninth Circuit concluded that § 317 of the Federal Power Act required that claim to be brought exclusively in federal court, because the claim was nothing more than a "naked attempt to enforce these federal obligations." *Id.* at 843.

The Third Circuit (and the Second Circuit before it), however, concluded that § 27 of the Exchange Act does *not* create an independent basis for federal jurisdiction. According to the Second and Third Circuits, federal "arising under" jurisdiction must exist independently under 18 U.S.C. § 1331 by virtue of a federal claim; the exclusive jurisdiction statutes do not *create* an independent basis for federal jurisdiction. Under this view, the only relevance of the exclusive jurisdiction statutes is that if there is federal "arising under" jurisdiction under 18 U.S.C. § 1331, due to the presence of a federal claim under the Exchange Act (and by implication, under the Federal Power and Natural Gas Acts), federal courts have *exclusive* jurisdiction over those

claims, rather than share concurrent jurisdiction with state courts.

The Second and Third Circuits, however, never attempted to grapple with the second category of claims that are based on "duties" and "liabilities" under the Exchange Act or its regulations. That is because they concluded, erroneously, that the question previously had been resolved by this Court under the Natural Gas Act's exclusive jurisdiction provision in *Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656 (1961).

C. *Pan American*, however, never addressed the meaning of the second category of cases over which federal courts have exclusive jurisdiction under the Natural Gas Act, because the Court had no occasion to do so. There, the plaintiff sued the defendants for simple breach of contract under state law. Unlike in this case, the plaintiff did not purport to incorporate a federal duty into its state-law cause of action. Rather, the defendants argued that they intended to rely on a federal regulation—an order by the Federal Power Commission accepting a rate schedule—as part of their defense. The defendants nonetheless argued that they should be permitted to remove the case to federal court because they would be raising a federal defense. Writing for the Court, Justice Frankfurter rejected this argument, because federal jurisdiction must be evaluated on the face of the plaintiff's complaint, the now familiar well-pleaded complaint rule. Further, the defendants' reliance on the Natural Gas Act's exclusive jurisdiction clause was misplaced, because it did not alter the fact that federal jurisdiction must be evaluated based on the

plaintiff's claim. Thus, *Pan American* observed that "'[e]xclusive' jurisdiction is given the federal courts but it is 'exclusive' only for suits that may be brought in the federal courts. Exclusiveness is a consequence of having jurisdiction, not the generator of jurisdiction because of which state courts are excluded." *Id.* at 664. Therefore, the plaintiff's case could not have been commenced in federal court, because the plaintiff asserted only a state-law breach of contract claim. Accordingly, the Natural Gas Act's exclusive jurisdiction clause was beside any relevant point.

Properly read, *Pan American* does not control the outcome of this case. Indeed, *Pan American* does not even address the question of statutory construction presently before the Court: Whether the exclusive jurisdiction statutes create an independent basis for federal jurisdiction over state-law claims based on alleged breaches of "duties" or "liabilities" created by any of the Exchange Act, the Federal Power Act, the Natural Gas Act and their regulations? The answer is plainly "Yes," because finding otherwise would render the words "duties" and "liabilities" utterly meaningless. By ignoring those words, the Third Circuit's decision means that an entire category of cases construing duties and liabilities under federal statutes and regulations will now remain in state court. In the context of the Natural Gas and Federal Power Acts, the Third Circuit's holding threatens to disrupt the wholesale energy industry. It will now be necessary to survey the law of all of the states to determine how provisions of tariffs on file with FERC may be interpreted and thus the standard with which the

industry must comply. The resulting piecemeal, state-by-state, state court litigation will erode the very predictability and certainty that Congress intended to promote through the uniform enforcement in federal court of duties and liabilities created by the Acts.

D. This result is untenable because Congress established a uniform, nationwide framework to avoid the confusion, inefficiency and unfairness that arise when interstate commerce is subject to separate (and potentially conflicting) regulation by 49 jurisdictions (the 48 contiguous states, excluding portions of Texas, plus the District of Columbia) in which natural gas and electricity are transmitted and sold at wholesale in interstate commerce. Unless reversed by this Court, the decision in this case will engender uncertainty in the energy industry that will interfere with long-term planning, encourage litigation and forum-shopping, and increase energy costs.

It is for these reasons that the Natural Gas and Electric Power Industry *Amici* urge this Court to overturn the Third Circuit's decision.

ARGUMENT

I. The Natural Gas Act And Federal Power Act Contain Federal Jurisdiction Conferring Provisions Meant To Ensure The Uniform Enforcement, Interpretation And Application Of Those Statutes

A. The Natural Gas Act and Federal Power Act Provide Uniform, Nationwide Frameworks for Regulating Interstate Energy Transactions

In the early 20th Century, "the States possessed broad authority to regulate public utilities, but this power was limited by our cases holding that the negative impact of the Commerce Clause prohibits state regulation that directly burdens interstate commerce." *New York v. FERC*, 535 U.S. 1, 5 (2002) (discussing *Public Util. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927)). Congress enacted the Federal Power and Natural Gas Acts to fill this gap to regulate the interstate commerce of the transmission and transportation, and the sale at wholesale, of electricity and natural gas. *Id.* at 6; *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983). Although the sale and delivery of electricity and natural gas occurred primarily on a local and intrastate basis when Congress enacted these statutes, *see, e.g., New York v. FERC*, 535 U.S. 1, 5 (2002), Congress concluded that there was an increasing need to fill this gap as the interstate trade in electricity and natural gas expanded. *See, e.g.*, S. Rep. No. 621, 74th Congress, 1st Session, p. 17 (noting "the rapid development of the electric industry along lines that

transcend State boundaries" such that "[t]he amount of energy which flowed in interstate commerce in 1933 exceeded the entire amount generated in the country in 1913"); H.R. Report No. 709, 75th Congress, 1st Session, p. 2 (observing in 1937 the "substantial development" of the interstate transportation of natural gas after 1926). The combination of these reasons led Congress to declare that "Federal regulation is necessary in the public interest" for "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce," 16 U.S.C. § 824(a), and "the transportation of natural gas and the sale thereof in interstate and foreign commerce." 15 U.S.C. § 717(a).

Since the enactment of the Federal Power and Natural Gas Acts, the volume of electricity and natural gas sold at wholesale in interstate commerce and transmitted or transported in interstate commerce has expanded significantly. This evolution has been facilitated by and developed in conjunction with changes in the regulatory framework implemented by the federal government pursuant to these statutes. As a result, the transmission of electricity and transportation of natural gas in interstate commerce, as well as the sale of electricity and natural gas within FERC's jurisdiction, are increasingly governed by tariffs of general applicability and ever more detailed FERC-promulgated regulations.

"Electricity," for instance, "is now delivered over three major networks, or 'grids,' in the continental United States." *New York*, 535 U.S. at 7. Electricity that enters these grids "immediately

becomes a part of a vast pool of energy that is constantly moving in interstate commerce." *Id.* To facilitate just and reasonable rates and mitigate undue discrimination in this transformed industry, "FERC adopted a pro forma Open Access Transmission Tariff (OATT), containing minimum terms and conditions for non-discriminatory service, which every transmission-owning public utility must file with the Commission and by which it must abide in providing transmission services to itself and others." *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 727 (D.C. Cir. 2000). FERC also codified its standards for authorizing market-based rate sales of electricity at wholesale, and created standardized provisions required to be included in individual market-based rate tariffs.

FERC also has authorized the creation of independent system operators and regional transmission organizations, individual entities that operate the transmission system and administer organized wholesale electricity markets. *NRG Power Mktg. v. Maine Pub. Utils. Comm'n*, 558 U.S. 165, 169 n.1 (2010). These systems are designed to increase competition and market efficiency for trading electricity at wholesale and to facilitate the transmission of electricity over longer distances, resulting in lower prices. Each such organization operates an area consisting of numerous electric utilities as a unified system, often over multiple states and affecting bordering regions, pursuant to tariffs on file with FERC. *Id.* (quoting *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1364 (D.C. Cir. 2004) (explaining how independent system operators provide service pursuant to "'a single,

unbundled, grid-wide tariff")). Interpretation of each such tariff impacts the hundreds of market participants and transmission customers within each region.

The natural gas industry also has experienced dramatic transformations. In 1978 and 1989, for instance, Congress "substantially narrowed" FERC's jurisdiction by removing "first sales" of natural gas from FERC's rate-setting authority. *See Amendments to Blanket Sales Certificates*, 68 Fed. Reg. 66,323, 66,325 (Nov. 17, 2003) (citing Natural Gas Policy Act of 1978, 15 U.S.C. § 3301 et seq., and Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157). In Order No. 636,[4] FERC required interstate natural gas pipelines to "unbundle" their transmission and sale of natural gas at wholesale services and to require pipelines to provide open and equal access to all shippers. As with electric transmission, natural gas transportation in interstate commerce is governed by FERC-filed tariffs of general applicability, which provide the terms and conditions of service by which the pipelines and shippers must comply. FERC's Order No. 636 also allowed entities to make jurisdictional sales of natural gas at market rates

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[4] *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations*, Order No. 636, 59 FERC ¶ 61,030 (1992), *order on reh'g*, Order No. 636-B, January 1991-June 1996 FERC Stats. & Regs. ¶ 61,272 (1992), *reh'g denied*, 62 FERC ¶ 61,007 (1993), *aff'd in part and remanded in part sub nom. United Distrib. Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996), *order on remand*, Order No. 636-C, 78 FERC ¶ 61,186 (1997), *order on reh'g*, Order No. 636-D, 83 FERC ¶ 61,210 (1998).

pursuant to blanket certificates. These policy changes led to a substantial increase in the number of large gas customers purchasing natural gas from entities other than the local distribution companies and acting as shippers on interstate pipelines.

In recent years, Congress has reiterated the increasingly interstate and national nature of the power and natural gas industries in how it has amended FERC's regulatory authority. In the Energy Policy Act of 2005, Congress amended the Federal Power and Natural Gas Acts to grant FERC the authority to promulgate regulations to prohibit market manipulation, 16 U.S.C. § 824v and 15 U.S.C. § 717c-1, borrowing language from the Exchange Act; to expand dramatically FERC's civil penalty authority under both statutes to up to $1 million per violation, per day, 16 U.S.C. § 825o and 15 U.S.C. § 717t; and to regulate the reliability of the bulk-power system. 16 U.S.C. § 824o.

Congress recognized when enacting the Federal Power and Natural Gas Acts, and underscored when amending these statutes in 2005, that the success of our interstate energy markets depends, in significant part, on the maintenance of a uniform and national regulatory regime for certain sales at wholesale and transmission in interstate commerce. That regime relies on a consistent body of federal case law enforcing the liabilities and duties created by these two statutes. The transformation of the regulatory regime under these statutes, with an increasing importance of jurisdictional service governed by standardized tariff provisions and FERC-promulgated regulations, further underscores the growing need for exclusive federal jurisdiction

over causes of action that require interpretation of these complex and technical requirements with obvious interstate and national implications.

B. The Natural Gas Act and Federal Power Act Exclusive Jurisdiction Provisions Reinforce Congress' Objectives of Creating Uniform Regulatory Frameworks for the Natural Gas and Electricity Industries

In furtherance of Congress' goal of creating uniform regulatory regimes for interstate transportation or transmission and wholesale sales of natural gas and electricity, § 24 of the Natural Gas Act and § 317 of the Federal Power Act each provides that the federal courts

> shall have *exclusive jurisdiction* of violations of [the Act] or the rules, regulations and orders thereunder, and *of all suits* in equity and actions at law *brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation or order thereunder...*"

15 U.S.C. § 717u; 16 U.S.C. § 825p (emphasis added). This language is substantially identical to § 27 of the Exchange Act.

As in all cases, the statutory text serves as the starting point for an inquiry into its meaning. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009). If the language of a statute is plain and unambiguous, it must be given effect and enforced according to its terms. *See Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010).

The language of §§ 24 and 317 is plain and unambiguous. The only reasonable interpretation of these provisions is that Congress empowered federal courts with the exclusive jurisdiction to decide not only cases "arising under" the statutes, but also those implicating the liabilities and duties established by the Natural Gas and Federal Power Acts. *See Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925) ("The plain obvious and rational meaning of a statute is always to be preferred. . . ."); *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U.S. 1, 12 (1878) (the Court must presume that lawmakers use words in "their natural and ordinary significance."). The natural reading of the text indicates that federal courts have exclusive jurisdiction of (1) violations of the Natural Gas and Federal Power Acts, and their implementing regulations, and (2) all suits in equity and actions at law brought to enforce any liability or duty created by the Acts. There is no reason to assume that Congress was just repeating itself by referring separately to "duties" and "liabilities." Courts must construe statutes so as to avoid rendering any part superfluous. *See Astoria Federal Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991); *see also Bailey v. United States*, 516 U.S. 137, 146 (1995) ("We assume Congress used two terms because it intended

each term to have a particular, non-superfluous reading.").

This reading of the text also makes sense. Providing exclusive federal jurisdiction over disputes relating to the interstate aspects of the natural gas and power industries furthers Congress' objective of creating a nationally uniform regulatory regime for wholesale sales and transmission in interstate commerce. In doing so, Congress plainly hoped to avoid the confusion, cost, and potential for conflict that would arise if state court judges under the guise of their particular state's laws were permitted to construe the meaning of duties and liabilities created by the Natural Gas and Federal Power Acts and FERC regulations.

C. The Third Circuit Did Not Attempt to Construe the Meaning of "Duties" and "Liabilities," and Essentially Rendered Them Meaningless

The Third Circuit recognized that the issue before it was "whether the exclusive jurisdiction provision in § 27 of the Exchange Act might nonetheless provide a more expansive basis [than 18 U.S.C. § 1331] for federal-question jurisdiction." Pet. App. 18a. But the Third Circuit did not attempt to construe the portion of § 27 that confers exclusive federal jurisdiction over claims that seek to enforce a liability or duty created by the Exchange Act or its regulations.

Rather than construe the actual language of § 27, the Third Circuit "believe[d] that the Supreme Court all but answered this question in *Pan*

American Petroleum Corp. v. Superior Court of Delaware In & For New Castle County, 366 U.S. 656 (1961)." *Id.* at 19-20a.[5] According to the Third Circuit, "[i]n reality, *Pan American* stands for the proposition that cases otherwise falling outside the scope of the district courts' *original jurisdiction* are not brought within it by virtue of an exclusive jurisdiction provision." Pet. App. 21a n.10. The Third Circuit therefore expressly followed the Second Circuit's decision in *Barbara v. New York Stock Exchange, Inc.*, 99 F.3d 49, 55 (2d Cir. 1996), and concluded that § 27 of the Exchange Act "is coextensive with § 1331 for purposes of establishing subject-matter jurisdiction—the exclusive jurisdiction provision merely serves to divest state courts of jurisdiction." Pet. App. 22a. In doing so, the Third Circuit expressly disagreed with decisions of the Ninth Circuit in *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 841 (9th Cir. 2004), and the Fifth Circuit in *Hawkins v. National Ass'n of*

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[5] Although not presently before the Court, the three-part test set forth in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), may provide an independent basis for federal jurisdiction over state-law claims based on "duties or liabilities" created by either the Federal Power Act or the Natural Gas Act. Under *Grable*, federal jurisdiction exists in the absence of an express or implied right of action, when (1) the state-law claim necessarily raises a disputed federal issue; (2) the federal interest in the issue is substantial; and (3) the exercise of jurisdiction does not disturb any congressionally approved balance of federal and state judicial responsibility. 545 U.S. at 314. Where, as here, Congress has provided for exclusive federal jurisdiction over claims based on duties and liabilities created by the Federal Power and the Natural Gas Acts, the *Grable* inquiry is unnecessary.

Securities Dealers Inc., 149 F.3d 330, 331-32 (5th Cir. 1998) (per curiam), that reached the conclusion that the exclusive jurisdiction provision is broader than § 1331.

The Third Circuit's reliance on *Pan American* was misplaced, because that case did not resolve the issue presented here.

II. *PAN AMERICAN* DID NOT ADDRESS EXCLUSIVE FEDERAL JURISDICTION OVER "DUTIES" AND "LIABILITIES" CREATED BY THE NATURAL GAS ACT

A. Pan American

As an initial matter, *Pan American* was *not* a case *decided* under the Natural Gas Act. The plaintiff, a natural gas pipeline company, entered into contracts to purchase natural gas from the defendant producers of natural gas. *Pan American*, 366 U.S. at 658. At the time the contracts were entered into, FERC's predecessor, the Federal Power Commission ("FPC"), did not assert jurisdiction over such sales. A state commission subsequently issued an order fixing the minimum price for gas *above* the prices originally agreed to by the contracting parties. *Id.* The pipeline sought judicial review of that order, but, pending the outcome of the dispute, agreed to pay the natural gas producers at the higher rate ordered by the state commission. *Id.* at 658-59. Subsequently, this Court held that, pursuant to the Natural Gas Act, the FPC was required to regulate wholesale sales by natural gas producers. *Id.* at 660 (citing *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 682 (1954)). Accordingly, following that

decision, the FPC ordered natural gas producers to file their rate schedules for such transactions. *Id.* The defendants in *Pan American* did so by filing the contracts with, among other things, the state commission minimum rate orders. *Id.* Thereafter, this Court, citing *Phillips*, invalidated the state supreme court's decision upholding the minimum rate order raising the price of natural gas above the contract price. *Id.* (citing *Cities Serv. Gas Co. v. State Corp. Comm'n*, 355 U.S. 391 (1958)).

The pipeline company later commenced an action in Delaware state court, asserting state-law breach of contract claims for the producers collecting rates higher than those originally agreed to in the bilaterally-negotiated contracts. *Id.* at 661. The natural gas producers challenged the jurisdiction of the state courts in view of the rate schedules on file with the FPC. According to the natural gas producers, "[s]ince the suits instituted by [the pipeline company plaintiff] involve rates so filed, they must either be to enforce a filed rate or to challenge a filed rate." *Pan American*, 266 U.S. at 662. The natural gas producers argued that, if the former, the claims were subject to the "exclusive jurisdiction" provision of the Natural Gas Act. The Supreme Court of Delaware rejected this argument because the pipeline company's claims "are not founded upon any liability *created* by the Natural Gas Act, but upon a private contract deriving its force from state law." *Id.* at 661.

This Court affirmed the Delaware Supreme Court's decision. Writing for the Court, Justice Frankfurter explained that "questions of federal jurisdiction and ouster of jurisdiction of state courts

are ... not determined by ultimate substantive issues of federal law. The answers depend on the particular claims a suit makes in state court – on how he casts his action." *Id.* at 662. This, of course, is nothing more than the well-pleaded complaint rule. The fact that the natural gas companies intended to raise a federal defense did not thereby create federal jurisdiction; jurisdiction must be evaluated on the face of the plaintiff's claim. And, Justice Frankfurter observed, the complaints in the Delaware state court only sought "recovery on alleged contracts to refund overpayments in the event of a judicial finding that the Kansas minimum rate order was invalid, or for restitution of the overpayments by which petitioners have allegedly been unjustly enriched under the compulsion of the invalid Kansas order. No right is asserted under the Natural Gas Act." *Id.* at 662-63.

The Natural Gas Act's exclusive jurisdiction provision did not alter that analysis, because the plaintiff's claim was not brought under the Natural Gas Act:

> "Exclusive jurisdiction" is given the federal courts but it is "exclusive" only for suits that may be brought in the federal courts. Exclusiveness is a consequence of having jurisdiction, not the generator of jurisdiction because of which state courts are excluded.

Id. at 664.

The Court then cited another state-law breach of contract case, in which the defendant asserted patent invalidity under the federal patent laws as a defense. *Id.* (citing *Pratt v. Paris Gas Light & Coke Co.*, 168 U.S. 255 (1897)). In that case, the Court had concluded that the exclusive jurisdiction clause in the patent laws did not "deprive the state courts of the power to determine *questions* arising under the patent laws, but only of assuming jurisdiction of 'cases' arising under those laws. There is a clear distinction between a case and a question arising under the patent laws." *Id.* And this is really what *Pan American* is about: The mere presence of a federal *issue* in a case arising by way of a defense does not create federal jurisdiction. Rather, jurisdiction must be evaluated on the face of the *claim* in the case.

The plain import of *Pan American* is that merely setting up a potential *defense* under the Natural Gas Act does not fundamentally alter the state-law nature of a breach of contract claim. Justice Frankfurter's reference to § 24 (then § 22) of the Natural Gas Act as not serving as a "generator of jurisdiction" must be understood in this light. Put another way, the Natural Gas Act's exclusive jurisdiction provision did not supplant the well-pleaded complaint rule.[6]

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[6] Justice Frankfurter notes that the Natural Gas Act's legislative history refers to "arising under" jurisdiction under § 24, the first part of the statute relating to express causes of action under the Natural Gas Act. *See Pan American*, 366 U.S. at 665 n. 2. The legislative history, however, does not refer to exclusive jurisdiction over causes of action that incorporate "duties" and "obligations" under the Natural Gas Act. *See* H.R.

Pan American plainly addressed an entirely different situation than the instant case. Here, following the well-pleaded complaint rule, the centerpiece of the Respondents' complaint is the purported violation of the SEC's Regulation SHO. This is *not* a case, like *Pan American*, in which a defendant is seeking to remove a state-law claim involving a claimed right "created by the state," *id.* at 664, to federal court based on a likely federal defense. Rather, this is a case where a plaintiff has expressly premised its state-law claim on the breach of a "duty" or "liability" created by a federal regulation. In other words, the well-pleaded complaint implicates federal jurisdiction. Under the plain terms of the exclusive jurisdiction provision, *that* claim belongs in a federal court.

Rep. No. 709, 75th Cong., 1st Sess., p. 91; S. Rep. No. 1162, 75th Cong., 1st Sess., p.7 ("This section imposes appropriate jurisdiction upon the courts of the United States over cases arising under the act."). The absence of legislative history obviously cannot defeat the express and unambiguous terms of a legislative enactment. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring) ("Judges interpret laws rather than reconstruct legislators' intentions. Where the language of the law is clear, we are not free to replace it with an un-enacted legislative intent."). If anything, Congress's silence in the legislative history confirms that "duties" and "liabilities" are words that are sufficiently clear on their face to require no further elaboration.

B. *Courts Have Recognized that* Pan American *Did Not Address the Exclusive Jurisdiction Provisions of the Federal Power and Natural Gas Acts in the Context of Claims Based on "Duties" or "Liabilities"*

As intended by Congress, FERC decides the overwhelming majority of legal questions involving the Federal Power and Natural Gas Acts through orders on assorted regulatory filings, subject to federal appellate review. Only occasionally do third parties (*i.e.*, not FERC) file complaints in trial courts that raise questions under these statutes. Of those cases, a majority likely satisfy federal question jurisdiction under § 1331 or diversity jurisdiction under § 1332. Nevertheless, on occasion a complaint is filed in state court that seeks "to enforce any liability or duty created" by the Federal Power or Natural Gas Act without necessarily satisfying the complex *Grable* test for federal question jurisdiction. Congress enacted the more expansive "exclusive jurisdiction" language in the Federal Power and Natural Gas Acts to ensure that such claims are litigated in the federal courts.

For example, in *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831 (9th Cir. 2004), the California attorney general filed a complaint in state court alleging that wholesale electricity suppliers violated California's unfair business practices law,[7]

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[7] After deciding the jurisdictional application of § 317 of the Federal Power Act, *Dynegy* also addressed whether the Federal Power Act preempted the state-law claims, a separate legal question not at issue here.

id. at 839, with respect to the ancillary services markets administered by the California Independent System Operator ("CAISO"), *id.* at 836, the entity that "manages the flow of electricity across the grid and balances supply and demand in real time." *Id.* at 835. Specifically, the state claimed "that the producers fraudulently sold energy on the spot market from *reserve* capacity that they had contracted to hold in reserve." *Id.* at 836. The CAISO-administered markets, including the requirements at issue here, were governed by its tariff, which was filed with and accepted by FERC pursuant to the Federal Power Act. *Id.* at 835. Recognizing that "tariffs are the 'equivalent of a federal regulation,'" *id.* at 839 (citations omitted), the Ninth Circuit determined that, because "[t]he state lawsuit turns, entirely, upon the defendant's compliance with a federal regulation" (*i.e.* the CAISO tariff), *id.* at 841, the federal court had exclusive jurisdiction over the case pursuant to § 317, even if federal jurisdiction was lacking under § 1331. *Id.* at 840-42. Consistent with the statutory language providing "exclusive jurisdiction" for "all ... actions at law brought to enforce any liability or duty created by" the Federal Power Act, the Ninth Circuit found that, "[a]bsent a violation of the FERC-filed tariff, no state law liability could survive." *Id.* at 841.

Similarly, in *PacifiCorp v. Northwest Pipeline GP*, 2010 WL 3199950 (D. Or. 2010), a natural gas pipeline shipper filed a complaint in state court alleging state-law claims for breach of contract and *res ipsa loquitur* negligence for damage caused to its natural gas-fired power plant due to lubricating oil allegedly introduced into the pipeline system. *Id.* at

*1. Both claims "refer to the gas quality standard contained in [the pipeline's] FERC-filed tariff." *Id.* at *4. Although the "claims rest in part on an allegation that [the pipeline] violated a federal regulation [*i.e.*, a FERC tariff] that does not itself give rise to a private cause of action," the district court found the claims "constitute garden variety state law claims with an embedded federal issue" not subject to federal jurisdiction under § 1331. *Id.* However, because "the plaintiff[']s contract and negligence causes of action turn on the meaning of provisions in the FERC-filed tariff"—namely, its gas quality requirements—the court found that the claims constituted a suit "brought to enforce a liability or duty." *Id.* at *6. Therefore, the complaint fell within the "exclusive jurisdiction" provision of § 24 of the Natural Gas Act.

Dynegy and *PacifiCorp* correctly gave meaning to the full statutory language of § 317 of the Federal Power Act and § 24 of the Natural Gas Act, properly recognizing that the plaintiffs' state-law claims were merely attempts to enforce liabilities and duties created by the Acts. Both opinions also appropriately distinguished the facts before them with those in *Pan American*. In *Dynegy*, for instance, the court appropriately recognized that the complaint in *Pan American* did not fall within the "exclusive jurisdiction" provision of then-§ 22 of the Natural Gas Act because the plaintiff did not assert a right under the Natural Gas Act. *Dynegy*, 375 F.3d at 842-43. In other words, the complaint did not constitute a suit in law "*brought* to enforce a liability or duty" under the Natural Gas Act. The court in *Dynegy* also accurately explained that this Court in

Pan American "gave only modest attention to whether the contract had been filed" with the FPC, "given that the alleged private contract at issue ... did not implicate the federal regulatory regime." *Dynegy*, 375 F.3d at 843 (citing *Pan American*, 366 U.S. at 663); *see also PacifiCorp*, 2010 WL 3199950 at *5 (citing *Pan American*, 366 U.S. at 663, for the proposition that "[a]n exclusive jurisdiction provision does not confer federal jurisdiction ... if the plaintiff's claims are not predicated on the federal government's exclusive regulatory regime"). By contrast, the Ninth Circuit added, the state's lawsuit "represented a naked attempt" to enforce "obligations directly and exclusively arising under regulations issued pursuant to the [Federal Power Act]." *Dynegy*, 375 F.3d at 843.

Congress has plainly reposed exclusive jurisdiction in the federal courts over claims based on a duty or liability created by the Natural Gas or Federal Power Acts to promote the uniform interpretation of those statutes. Such claims far more closely resemble those asserted in *Manning* than in *Pan American*.[8] The Third Circuit in

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[8] Although sales of electricity and natural gas at wholesale continue to occur through bilateral contracts as in *Pan American*, those industries and their regulatory frameworks have evolved. For example, FERC's policies requiring open access for the jurisdictional transmission of electricity and natural gas have led to an increase in the number of customers taking such service. FERC-filed tariffs of generally applicability typically govern such service. As this Court has found, tariffs are not merely contracts; they bind the parties "with the force of law." *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939) (discussing railroad tariffs issued pursuant to the Interstate Commerce Act, the predecessor to the Federal Power and Natural Gas Acts). A

Manning erred by concluding that *Pan American* controlled the outcome in this case because, unlike here, the plaintiff in *Pan American* did not assert any breach of a statutory or regulatory duty or liability. By contrast, claims expressly based on regulations promulgated by or tariffs filed with FERC under the Federal Power and Natural Gas Acts, as in *Dynegy* and *PacifiCorp*, present an entirely different set of concerns regarding the uniform interpretation of those Acts. It is to ensure the uniform interpretation and application of the Natural Gas Act and Federal Power Act that Congress conferred exclusive jurisdiction in the

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complaint brought to enforce duties or liabilities created by a tariff-based rate schedule raises issues well beyond those typically in a bilaterally-negotiated, two-party contract. For the transmission of electricity, in fact, FERC has created a *pro forma* Open Access Transmission Tariff adopted in near-identical form by most transmission providers.

FERC also has developed standardized tariff language for market-based rate tariffs governing the sale of electricity at wholesale, whose uniform interpretation in a federal forum is key. The same is true of the detailed rules governing organized markets for a variety of electricity products, particularly where those markets span multiple states. PJM Interconnection, L.L.C., for example, administers organized markets in all or part of 13 states and the District of Columbia, while the Midcontinent Independent System Operator, Inc.'s markets span 15 states and one Canadian province. *See* PJM Interconnection, L.L.C., *Who We Are*, *available at* http://www.pjm.com/about-pjm/who-we-are.aspx; Midcontinent Independent System Operator, Inc., Corporate Information, *available at* https://www.misoenergy.org/Library/Repository/Communication%20Material/Corporate/Corporate%20Fact%20Sheet.pdf. Maintaining exclusive federal jurisdiction over the interpretation of the market rules set forth in these tariffs, as intended by § 317 of the Federal Power Act, is essential.

federal courts over claims premised on the breach of a FERC regulation or a FERC-approved tariff. By using substantially similar language, the Exchange Act achieved the same objective with respect to the claims here based on SEC Regulation SHO.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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